Office-Supreme Court, U.S.
FILED
APR 7 1959
JAMES R. BROWNING, Clerk

No. 755

In the Supreme Court of the United States

OCTOBER TERM, 1958

W. T. HAGANS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet., 19-25) is reported at 261 F. 2d 924.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1958. A petition for rehearing was denied on February 5, 1959. The petition for a writ of certiorari was filed on March 7, 1959. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law.

2. Whether the Court should reconsider its holding in *Sherman* v. *United States*, 356 U.S. 369, that entrapment is a jury issue.

3. Whether the trial court's instructions on the issue of entrapment were adequate.

4. Whether prejudicial error resulted from the government attorney's explanation as to why he did not produce in court a recording that petitioner's attorney had asked him to produce.

STATEMENT

On May 17, 1958 in the United States District Court for the Middle District of Georgia, petitioner was convicted by a jury on two counts of a seven count indictment charging him with the possession and transportation of "moonshine" whiskey, in violation of 26 U.S.C. § 5008(b)(1) and 5642 (R. 2-5). Petitioner was sentenced to concurrent terms of 2 years (R. 245-246).

The government's evidence showed that on August 23, 1957 petitioner telephoned Robert Harding, a Georgia State Revenue Agent (R. 51-52). Petitioner said he wanted to talk to Harding and they agreed to meet at a place south of Thomaston, Georgia (R. 52). There petitioner asked Harding if they could not do business together. Petitioner said he had a liquor still "in a field partly camouflaged" and offered Hard-

ing $75 a week to protect him (R. 53). Harding refused the money, saying he would need a week to think about it and "feel out" his partner (R. 53). Harding reported this conversation to his superior officers and they decided to contact the federal Internal Revenue Service (R. 55). The federal Service sent Donald Perry to Thomaston to assist on the case (R. 56).

On August 30, 1957 petitioner again called Harding and asked how things were going (R. 56). Harding said that they would get together that evening and talk (R. 56). Later that night Harding and Perry (introduced as Donald Edwards) met petitioner (R. 9, 56). Petitioner offered each of them $100 a week for protection. When they agreed, he handed $200 to the agents (R. 9-10, 12, 56). Petitioner said that he had a "30-sacker" still on Po Biddy Road and that he used a 1952 Ford 4-door sedan and a 1949 Frazer, with a spotlight on the side of it, to transport the whiskey and to take supplies in and out (R. 10-11, 57, 58).

Harding next met petitioner on September 6, 1957, at which time petitioner related that he was "doing just fine, making liquor and everything was running smooth" (R. 59). He gave Harding $200 which Harding turned over to agent Perry (R. 59).

The three met again on September 13, 1957. They discussed petitioner's operations and he asked the agents if they could get two other agents out of the territory. They told him they would (R. 12-13, 60-61). Petitioner gave $200 to the agents. Agent Perry mentioned to petitioner that he could bring a bootlegger up from Florida who would pay him more for his moonshine than he was currently getting (R. 12, 61-62). Petitioner said that that would be a good idea

(R. 12-13). The man from Florida was again discussed at a meeting of the three on September 19, 1957 (R. 13, 14, 61-62). The next meeting took place on September 22, 1957. Frank Watt, a federal revenue agent, went to Thomaston to pose as the buyer from Florida (R. 14, 62, 102-103). They met at a spot on Po Biddy Road and petitioner and Watt agreed to a sale and the agents (Harding, Perry and Watt) agreed to meet petitioner at the same spot the next night to pick up the liquor (R. 14-15, 63, 103-104). The agents met petitioner the next night and transferred the liquor from petitioner's 1949 Frazer (R. 15, 64). Watt paid petitioner $400 (R. 15, 64, 104-105).

On September 26, 1957, at the same meeting place on Po Biddy Road, petitioner gave Perry $200 for protection and also $40 for arranging the sale to Watt (R. 16, 65). The agents informed petitioner that Watt would like to make another purchase and that he would be up on September 29 for 200 gallons (R. 66). At the meeting Harding wore a recording device that recorded his conversation with petitioner (R. 66).

On the 29th of September, when petitioner made his delivery to Watt at the meeting place on Po Biddy Road, Watt arrested him and seized the 200 gallons of non-taxpaid whiskey in the 1949 Frazer (R. 16, 67, 105-106). Harding, Perry, Watt and several other state and federal officers then went to the house on Po Biddy Road where petitioner had earlier told them his distillery was located (R. 17, 68). There they discovered the distillery in operation and about 65 gallons of whiskey (R. 17-18, 68-69, 106-107).

Petitioner's defense was entrapment. He testified that in the summer of 1957 he was not engaged in the handling of liquor (R. 169); that Harding came to his house and talked to him about setting up a still (R. 171); that Harding came back the next night and again asked petitioner to set up a still; and that a few days later Harding brought Perry to see him and also the uncle of petitioner's wife, who told petitioner that "they're liable to plant some on you" if he did not set up a still (R. 172). Petitioner then relented and did "as they said to do." (R. 173). He also stated that the agents (Harding and Perry) loaned him $250 to get the enterprise started (R. 173). Petitioner testified that, in addition to paying back this loan, the agents required him to pay them $200 a week (R. 174).

At the close of the evidence, defendant moved for a directed verdict on the ground that "the evidence here is sufficient to show entrapment" (R. 201). The court ruled (R. 202), however, that "it is a jury question," and submitted the issue to the jury under detailed instructions (see *infra*, pp. 7-8).

The Court of Appeals unanimously affirmed. It found "no merit" in the contention that the "defense [of entrapment] was established as a matter of law" (Pet., 20). Noting petitioner's concession that "There is a strong conflict of evidence as to how the enterprise between the officers and Hagans began" (*ibid.*), it ruled (Pet., 21) that the testimony of the Government witnesses "that it was appellant alone who initiated and pressed the negotiations was evidently accepted by the jury on the question of entrapment, and we think the jury was amply justified in believing the agents in preference to appellant and his witnesses." The court also rejected the contention "that the

charge of the trial judge on the issue of entrapment was prejudicially inadequate" (Pet., 21), holding (*id.*, p. 22) that, "viewed as a whole, it was exceedingly liberal to the appellant * * *."

ARGUMENT

1. Contrary to petitioner's contention (Pet., 8-10), the evidence does not establish, as a matter of law, that he was entrapped. As petitioner himself admits (Pet., 4), the "evidence is conflicting as to how the enterprise between the officers and appellant began." The evidence presented by the government, which the jury accepted, clearly showed that it was petitioner, and not the government agents, who initiated the criminal scheme. See *supra*, pp. 2-3. This evidence showed that petitioner, a convicted liquor law violator and apparently known as "a big bootlegger" (R. 171), had sought out government agent Harding in order to buy protection. Here, therefore, the criminal conduct was not "'the product of the *creative* activity' of the law-enforcement officials," since the "government agents 'merely afford[ed] opportunities or facilities for the commission of the offense'" which petitioner was already prepared and anxious to commit. *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386.

The fact, upon which petitioner relies (Pet., 4), that during the two months following his initial approach to the government agents they jointly participated in illicit activities which led up to the crimes for which he was convicted, does not establish entrapment. For it shows only that "the particular act was committed at the instance of government officials," not

that it was the "product of the[ir] creative activity." *Sorrells* v. *United States*, 287 U.S. 435, 451.

2. Petitioner urges (Pet., 6-8), however, that this Court should reexamine its recent decisions in *Sherman* and *Masciale*, *supra*, that entrapment is an issue for the jury. But he presents no new arguments that were not considered and rejected by the Court in those cases. Accordingly, we submit that there is no occasion for the Court to reconsider the issue, which it decided adversely to petitioner less than a year ago, in a case in which the evidence shows that petitioner was not entrapped.

3. Petitioner contends (Pet., 10-13) that the trial court's instructions on the issue of entrapment were not clear enough to permit the jury to apply the law. As alleged examples of this, he cites certain words and phrases used in the charge which he claims were inadequately defined. When read as a whole, however, we submit that the charge was clear and explicit, and adequately informed the jury as to the standards for deciding the entrapment issue.

The principle portion of the charge was as follows (R. 207-210):

> And going further into this question of entrapment, I charge you that if a person is already engaged in the violation of the law and if he is simply awaiting an opportunity to violate it further, and if an officer or anyone else comes along and affords the opportunity that he is ready to accept and take advantage of, then there is no entrapment.
>
> If on the other hand a person is not engaged in the violation of the law and is not presently thinking about or entertaining any notions about violating the law, and if an officer or someone else

comes along and originates the idea, and implants the idea in the person's mind, and that person, who theretofore hadn't thought about it, and wasn't thinking about violating the law, yields to that suggestion and acts upon the idea implanted in his mind by the third person, then that would be entrapment, and a jury ought not to convict in such a case.

The gist of the defense of entrapment is the conception of the crime by the government's agent for the purpose of prosecuting the defendant, the latter not having any previous intention to commit it.

* * *

The test is whether the offense originated in the mind of the accused or in the mind of the official. For the offense to originate in the mind of the defendant, it is not necessary that the defendant be the instigator of the particular sale or act, but only that he have the general intention to commit such an offense when the opportunity was presented.

4. Finally, petitioner contends (Pet., 13-17) that he was prejudiced by a statement made by the prosecutor in connection with petitioner's request for production of a recording. Agent Harding testified (R. 66) that he wore a wire recorder at his September 26 meeting with petitioner. He stated that he did not know whether the recording turned out or what had happened to it (R. 66). On cross-examination petitioner's counsel asked Harding where the recording was. Harding said that it had been turned back to the federal government. Defense counsel then said "[i]f you have the bug I would like to have a record—". The Assistant United States Attorney, Mr. Buford, said: "I didn't call for the bug to be produced

down here, Judge. I'll go out here in the hall and see if they have it." Petitioner's counsel then said to Mr. Buford, "See if you can get the tape and wire and everything" (R. 71). When Mr. Buford returned he told the court that the recording was not produced because "none of the conversation could be understood" (R. 73). Defense counsel objected to the statement on the ground that the prosecutor was testifying, and moved for a mistrial. The court overruled the motion and instructed the jury to pay no attention as to why the apparatus was not produced (R. 73-76).

Petitioner contends that the trial court erred in overruling this motion because the statement had the effect of explaining away the inference which petitioner was entitled to draw from the Government's failure to produce the recording device that, if it had been produced, it would have been unfavorable to the prosecution (Pet., 15-17). But in view of the request by petitioner's counsel that the prosecutor attempt to obtain the recording, and the prosecutor's reply that he would "go out here in the hall and see if they have it," the prosecutor was fully warranted in explaining why he had been unable to obtain it. As the Court of Appeals stated (Pet., 25), "It is difficult to see how the Government's attorney could have responded to appellant's request in any other way than he did." The situation is analogous to those in which the government attorney explains or refers to evidence outside the record in response to statements of opposing counsel in his closing argument. In *Hilliard* v. *United States*, 121 F. 2d 992 (C.A. 4), certiorari denied, 314 U.S. 627, the government attorney, in response to a challenge in defendant counsel's closing argument as

to why the government did not produce documentary evidence of a telephone call allegedly linking the prosecuting witness to defendant, stated that such evidence was not produced because the records of the telephone company covering that period had been destroyed. The Court of Appeals held that such a statement was not prejudicial. See, also, *Schmidt* v. *United States*, 237 F. 2d 542 (C.A. 8); *Myres* v. *United States*, 174 F. 2d 329 (C.A. 8), certiorari denied, 338 U.S. 849; *Baker* v. *United States*, 115 F. 2d 533 (C.A. 8), certiorari denied, 312 U.S. 692.

The testimony was that the recording device was used only at the September 26 meeting. The trial court instructed the jury to ignore the incident. We submit that the trial court correctly denied the motion; and that, in any event, as the Court of Appeals stated (Pet., 25), this minor event in a trial in which petitioner's defense of entrapment was contradicted by the "overwhelming evidence" did not constitute prejudicial error calling for reversal.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1959.

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